MISCELLANY.

Libel and Slander—Slander in the Court Room.—In Houghton *v.* Humphries, in the Supreme Court of Washington (April, 1915, 147 Pac. 641), it was laid down that while the immunity of an attorney or party from liability for slander based on words spoken in course of a judicial proceeding, is but qualified and does not apply in the case of matter irrelevant to the proceeding, the privilege in the case of a judge is absolute, there being no right of action for slander against him for any statements made in his official capacity while trying a cause. In the recent decisions of the Court of Errors and Appeals of New Jersey, in La Porta *v.* Leonard (March, 1916, 97 Atl. 251), the limitation of an attorney's privilege was exemplified. It was alleged that during a proceeding in the Recorder's Court, in the City of Hoboken, the defendant, a lawyer of many years' standing, had applied to the plaintiff, "a colaborer at the bar," the following language:

"You are a vermin. You are a disgrace to the Bar, and are starting out in the wrong way as a young lawyer. This will give you a black eye. You and your client committed perjury. You subborned your client."

It was laid down in the syllabus by the court "that the rule of privilege invoked and enunciated in the case of Munster *v.* Lamb (11 Q. B. Div. 588), commonly designated as the English rule, has been quite generally repudiated in this country and is not the law of this state;" and that "the privilege invoked does not extend to the limit of protecting counsel in giving utterance to slanderous expressions against counsel, parties or witnesses, which expressions have no relation to or bearing upon the issue or subject-matter before the court."

It was actually decided that the trial court in the present action for slander had properly left to the jury the question of the pertinence and relevancy of the language for determination. On the other hand, as it appeared that the plaintiff had previously at the same hearing given utterance to slanderous remarks concerning the defendant, it was further decided that the trial court had erred in not instructing the jury to consider the plaintiff's remarks upon the question of the existence of malice or provocation in mitigation of damages.

This New Jersey decision, citing many earlier American authorities bears out the principle laid down in Houghton *v.* Humphries (supra) that an attorney's privilege is qualified and not absolute. Furthermore, it is quite probable that the sweeping assertions of absolute privilege on the part of a judge in this and other American cases would be taken to mean only a wider privilege than that enjoyed by counsel and not unqualified immunity from liability. In the prin-

cipal case, indeed, which was an action against a judge, not only was the court "inclined to the view that the words complained of are not actionable, in any events," but, "also that the allegations of the complaint fail to negative their relevancy to the proceeding during the course of which they were spoken. It is not unlikely that remarks by a judge in reprimanding an attorney would be held privileged where the same remarks by one attorney to another would be non-privileged. The English rule in Munster *v.* Lamb, repudiated by the New Jersey decision, is stated by the New Jersey court to be that "the privilege of an advocate with respect to defamatory words uttered by him as advocate, in the course of a judicial inquiry, with reference to the subject-matter of the inquiry, is absolute and unqualified, and that no action can be maintained against him for such words, even though they were irrelevant and spoken maliciously and without reasonable cause." But in Newell on Slander and Libel (sec. 517), the English rule with regard to judges is given in this form:

"Everything that a judge says on the bench * * * is absolutely privileged, *so long as it is in any way connected with the inquiry.*" (Italics ours.)

If a judge should take advantage of his position in court to indulge a private grudge by inflicting an insult that was utterly unrelated to any matter before him, there is no logical reason why he should not be liable to a suit for slander in like manner as a member of the Bar who had been guilty of a similar abuse of his professional position. Indeed, it could be contended that such words were not spoken "in the performance of an official act," so that they would not be privileged within the actual ruling of the principal case.

One of the latest judical statements of the privilege of witnesses was made in the decision of the Court of Appeals of Georgia in Buschbaum *v.* Heriot (63 S. E. 645). The following is from the official syllabus, the italics being ours:

"The circumstances under which testimony is given determine whether the privilege of a witness is absolute or conditional. Generally the testimony delivered in a judicial proceeding and before a court with jurisdiction to consider the question at issue is absolutely privileged. No actionable liability attaches to a witness for any statement contained in his testimony, no matter how false or malicious that testimony may be, *unless the witness, without being asked, volunteers a false and malicious defamatory statement which is not pertinent, and which the witness neither believes to be true nor has any sufficient reason to believe to be material.* The answers of a witness in direct response to questions by counsel (which have not been forbidden by the court) are absolutely privileged, and, though the statements of the witness in testimony thus adduced be not only defamatory and malicious but knowingly false, a prosecution for perjury is the only redress provided by law."—New York Law Journal.

Labor on Highways Not Involuntary Servitude.—Jake Butler of Columbia county, Fla., was an able-bodied man over twenty-one years of age and under forty-five. Chapter 6537, Laws of Florida (Acts of 1913, pp. 469, 474, 475), requires all such resident males to work for six days in each year on roads or bridges, or in lieu thereof to furnish a substitute or a cash payment of three dollars.

But Jake, when duly notified, wouldn't work, provide a substitute, or pay. So he was haled into court, and sentenced to jail for thirty days. The state circuit and supreme courts upheld his conviction. The higher court's opinion is published in 66 Southern Reporter, 150. The case was carried to the United States Supreme Court on writ of error.

Jake claimed that the road law imposed involuntary servitude not as a punishment for crime, contrary to the Thirteenth amendment to the United States Constitution. Moreover, the enforcement of the law was a deprivation of liberty and property without due process of law and prohibited by the Fourteenth amendment.

Mr. Justice McReynolds delivered the opinion for the United States Supreme Court (Jake Butler *v.* J. W. Perry, 36 Supreme Court Reporter, 258), saying, in part: "In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus declared in Blackstone's Commentaries, bk. 1, p. 357: 'Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy. * * *'"

The court held that the Thirteenth amendment applied only to such involuntary servitude as was akin to African slavery, and was not intended to affect enforcement of duties owed by citizens, such as services in the army and on the jury. There was no taking of property (labor) without due process of law, the Fourteenth amendment being intended to preserve such rights as had long been recognized under the common-law system. It has never been regarded as a deprivation of liberty or property to require work on highways.

Invalidity of Second Marriage as a Defense to Bigamy Charge.—The ingenious defense interposed in the bigamy case of Allen *v.* State, 87 Southeastern Reporter, 681, that where both parties to a bigamous marriage have former spouses living, no crime is com-

mitted, suggests the proposition that where neither party has suffered an injustice neither can be guilty. This theory overlooks the fact that wrong has been done the lawful spouses and that the public—the State—is the aggrieved party in all criminal transactions.

The opinion of Judge Wade, for the Georgia Court of Appeals does not however, include the proposition suggested, but concerns itself merely with defendant's contention that neither party having ability to contract the marriage, "there could be no contract or consummation according to law."

The opinion reads in part: "The only authorities cited by counsel for plaintiff in error on this point are sections 2930 and 2931 of the Civil Code, the first of which gives the essentials of a 'valid marriage' in this state, and the other pointing out those who are legally able to contract marriage. Counsel, it seems to us, loses sight of the fact that these Code sections deal solely with 'valid marriages,' and that, if his contention was correct, then there could never be in Georgia a conviction for bigamy. One cannot be convicted for entering into a valid marriage. A marriage between one already married and one unmarried is not a valid marriage, because one of the parties labors under the disability of a 'previous marriage undissolved,' and still such married person who enters into the contract with one unmarried can be convicted legally of bigamy. We are unable to see the distinction between an 'invalid marriage,' whether entered into between one married and one unmarried or between two persons both of whom are laboring under disability because of previous marriage undissolved. Before there can be bigamy, it is true, that there must have been a prior legal contract of marriage. But the crime of bigamy is based entirely upon the proposition that the second or bigamous marriage is not, and cannot be legal. If it were a legal marriage, there could be no bigamy."

Soldiers—Right to Imprison—Depriving Commanding Officer of Services.—Municipal authorities, writes Eugene S. Bibb in the August Case and Comment, have the right to arrest and imprison a soldier off the military reservation for breaches of the peace if such arrest and imprisonment do not deprive his commanding officer of his services. If such be the case, then the civil authority must release the soldier to the commanding officer, for he is entitled to the unqualified services of all the men in his command. In the noted case of Ex parte Schlaffer, 154 Fed. 921, a soldier was arrested and confined by the city police in the course of a raid upon the soldiers, planned by the police. An excessive fine was imposed by the city court, upon default in payment of which an alternative of a long term of imprisonment was given. The Federal court in Ex parte Schlaffer, 154 Fed. 921, trying the appeal said:

"While an enlisted man in time of peace may be subjected to ar-

rest and imprisonment for violation of a municipal ordinance the same as a civilian, yet where any punishment is sought to be inflicted which will interfere with the duties which he owes to the United States, the utmost good faith is required from civil authorities, and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, may be inquired into by his commanding officer in proceedings in the Federal courts."

In that case the commanding officer was granted a writ of habeas corpus.

Claim in Bankruptcy for Damages for Breach of Marriage Promise. —A broken-hearted damsel poured out her sad story of unrequited love before twelve just men and true, and was awarded as a salve to her wounded feelings the sum of $25,000.

Presumably, the prescribed salve was regarded by defendant as somewhat too costly for his modest purse; for he sought the aid of a higher court, and was given another chance to plead his defense before a jury. Pending appeal defendant filed a petition in bankruptcy, and plaintiff filed her claim for $25,000. After reversal of judgment by the state appellate court, defendant asked that the claim in bankruptcy be "reviewed, discharged, and expunged."

In his opinion for the Circuit Court of Appeals, Second Circuit, in Re Martin, 228 Federal Reporter, 184, Judge Coxe says: "The question here is whether the claim for damages for the breach of a contract is one that can be sent to the state court for determination. The bankrupt insists that, the judgment of the state court having been reversed, there is now no legal claim against him, the law relating only to claims which are admitted or conclusively proved, and not to claims which are unliquidated, denied, and which may never be established at all. It seems to us that the referee was right in holding that section 63b covers the present controversy, and that under this section he was justified in regarding the claim as unliquidated, and properly found that it should be liquidated in such manner as the court may direct, and then proved against the estate for the amount allowed. An action such as this is generally supposed to be one within the province of a jury, and it is thought that the referee did not exceed his powers in ordering that the claim be determined in the Supreme Court of the state where the action was commenced and where it is now pending. The argument that a breach of promise to marry is not a claim until the question whether or not there was a contract of marriage is finally settled is ingenious but not convincing. It is too refined for everyday application."